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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

6 \* \* \*

7 AMIR F. ABD-ELMALEK,

Case No. 2:16-cv-02509-APG-GWF

8 Plaintiff,

9 v.

**ORDER**

10 BARRY H. JENKINS, *et al.*,

11 Defendant[s].

12 This matter is before the Court on Plaintiff's Amended Complaint (ECF No. 10), filed on  
13 May 1, 2017.

14 **BACKGROUND**

15 On November 3, 2016, the undersigned entered an order granting Plaintiff's Application  
16 for Leave to Proceed *In Forma Pauperis* and dismissing Plaintiff's complaint without prejudice.  
17 The Court granted Plaintiff leave to file and amended complaint to amend the deficient claims no  
18 later than **December 2, 2016**. Plaintiff failed to file an amended complaint and mail sent to him  
19 was returned. *See* ECF Nos. 4,5. On March 8, 2017, the Court, therefore, dismissed his case. ECF  
20 No. 6. On March 27, 2017, Plaintiff filed a motion to re-open his case and on April 4, 2017, the  
21 Court granted his motion.

22 **DISCUSSION**

23 Upon granting a request to proceed in forma pauperis and granting leave to amend, a court  
24 must additionally screen a complaint pursuant to 28 U.S.C. §1915(e). Specifically, federal courts  
25 are given the authority to dismiss a case if the action is legally "frivolous or malicious," fails to  
26 state a claim upon which relief may be granted, or seeks monetary relief from a defendant/third  
27 party plaintiff who is immune from such relief. 28 U.S.C. § 1915(e)(2). A complaint, or portion  
28 thereof, should be dismissed for failure to state a claim upon which relief may be granted "if it

1 appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims that  
2 would entitle him to relief.” *Buckey v. Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). A  
3 complaint may be dismissed as frivolous if it is premised on a nonexistent legal interest or  
4 delusional factual scenario. *Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989). Moreover, “a  
5 finding of factual frivolousness is appropriate when the facts alleged rise to the level of the  
6 irrational or the wholly incredible, whether or not there are judicially noticeable facts available to  
7 contradict them.” *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

8 When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to  
9 amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of  
10 the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*,  
11 70 F.3d 1103, 1106 (9th Cir. 1995). In its order (ECF No. 2), the Court gave Plaintiff leave to  
12 amend the noted deficiencies of his complaint and informed Plaintiff that pursuant to Local Rule  
13 15-1, the Court could not refer to a prior pleading in order to make his amended complaint  
14 complete.

#### 15 **I. Screening the Instant Amended Complaint**

16 Upon granting a request to proceed *in forma pauperis*, a court must additionally screen  
17 complaint pursuant to 28 U.S.C. § 1915(e). Specifically, federal courts are given the authority to  
18 dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which  
19 relief may be granted, or seeks monetary relief from a defendant/third party plaintiff who is  
20 immune from such relief. 28 U.S.C. § 1915(e)(2). A complaint, or portion thereof, should be  
21 dismissed for failure to state a claim upon which relief may be granted “if it appears beyond a  
22 doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to  
23 relief.” *Buckey v. Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). When a court dismisses a  
24 complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with  
25 directions as to curing its deficiencies, unless it is clear from the face of the complaint that the  
26 deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106  
27 (9th Cir. 1995).

1 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a  
2 complaint for failure to state a claim upon which relief can be granted. Review under Rule  
3 12(b)(6) is essentially a ruling on a question of law. See *Chappel v. Laboratory Corp. of*  
4 *America*, 232 F.3d 719, 723 (9th Cir. 2000). A properly pled complaint must provide a “short  
5 and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P.  
6 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although Rule 8 does not  
7 require detailed factual allegations, it demands “more than labels and conclusions” or a  
8 “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937,  
9 1949 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The court must accept as true  
10 all well-pled factual allegations contained in the complaint, but the same requirement does not  
11 apply to legal conclusions. *Iqbal*, 129 S.Ct. at 1950. Mere recitals of the elements of a cause of  
12 action, supported only by conclusory allegations, do not suffice. *Id.* at 1949. Secondly, where  
13 the claims in the complaint have not crossed the line from plausible to conceivable, the  
14 complaint should be dismissed. *Twombly*, 550 U.S. at 570.

15 To satisfy the screening requirements with respect to social security appeals, a plaintiff  
16 must set forth the following: (1) the plaintiff must establish that she has exhausted her  
17 administrative remedies pursuant to 42 U.S.C. § 405(g), and that the civil action was commenced  
18 within sixty days after notice of a final decision; (2) the complaint must indicate the judicial  
19 district in which the plaintiff resides; (3) the complaint must state the nature of the plaintiff’s  
20 disability and when the plaintiff claims she became disabled; and (4) the complaint must contain  
21 a plain, short, and concise statement identifying the nature of the plaintiff’s disagreement with  
22 the determination made by the Social Security Administration and show that the plaintiff is  
23 entitled to relief. *Montoya v. Colvin*, 2016 WL 890922, at \*2 (D. Nev. Mar. 8, 2016) (citing  
24 *Soete v. Colvin*, 2013 WL 5947231, \*2 (D. Nev. Nov. 4, 2013); *Pitcher v. Astrue*, 2012 WL  
25 3780354, \*1 (D. Nev. Aug. 30, 2012)).

26 Plaintiff alleges a claim against the administrative law judge, Barry H. Jenkins,  
27 challenging his denial of disability insurance benefits. He alleges that he was disabled. Plaintiff  
28 claims that the Social Security Commissioner, initially and upon reconsideration, denied his

1 applications for disability insurance benefits. Plaintiff states that he requested review of the  
2 ALJ's decision with the Appeals Council, which was denied. Plaintiff now seeks judicial review  
3 of that final agency decision. Federal courts only have jurisdiction to conduct judicial review of  
4 the SSA's final decisions. *See* 42 U.S.C. § 405(g); *Klemm v. Astrue*, 543 F.3d 1139, 1144 (9th  
5 Cir. 2008); *see also Cilifano v. Sanders*, 430 U.S. 99, 107–09 (1977). Plaintiff appears to have  
6 fully exhausted his administrative remedies with the SSA. The Court will, therefore, allow  
7 Plaintiff's complaint to proceed as a petition for judicial review of a final agency decision.

8 Plaintiff, however, has named the incorrect defendant. A complaint that seeks review of  
9 a social security determination is properly brought against the acting Commissioner of Social  
10 Security, Nancy A. Berryhill, not the individual Administrative Law Judge. The Court will,  
11 therefore, amend Plaintiff's amended complaint to include the acting Commissioner of Social  
12 Security, Nancy A. Berryhill, as the Defendant in this matter. Accordingly,

13 **IT IS HEREBY ORDERED** that the Amended Complaint (ECF No. 10) is permitted to  
14 proceed.

15 **IT IS FURTHER ORDERED** that the Clerk of the Court shall serve the Commissioner  
16 of the Social Security Administration by sending a copy of summons and Complaint by certified  
17 mail to: (1) Office of the Regional Chief Counsel, Region IX, Social Security Administration,  
18 160 Spear Street, Suite 899, San Francisco, California 94105, and (2) the Attorney General of the  
19 United States, Department of Justice, 950 Pennsylvania Ave. NW, Washington DC 20530.

20 **IT IS FURTHER ORDERED** that the Clerk of the Court shall issue summons to the  
21 United States Attorney for the District of Nevada, and deliver the summons and Complaint to the  
22 U.S. Marshal for service.

23 **IT IS FURTHER ORDERED** that Defendants shall have **sixty (60) days** from the date  
24 of service to file their answer or responsive pleading to Plaintiff's Complaint in this case.

25 **IT IS FURTHER ORDERED** that henceforth, Plaintiff shall serve upon Defendant, or  
26 their attorney if they have retained one, a copy of every pleading, motion, or other document  
27 submitted for consideration by the court. Plaintiff shall include with the original paper submitted  
28 for filing a certificate stating the date that a true and correct copy of the document was mailed to

1 Defendant or their counsel. The court may disregard any paper received by a district judge,  
2 magistrate judge, or the Clerk which fails to include a certificate of service.

3 Dated this 6th day of May, 2019.

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6 GEORGE FOLEY, JR.  
7 UNITED STATES MAGISTRATE JUDGE  
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